93-585

Supreme Court, U.S.
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Docket No. _____

In The Supreme Court of the United States

October Term 1993

BASDEO BALKISSOON and
GLORIA BALKISSOON,

Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE SENDING OF A NOTICE OF DEFICIENCY [26 U.S.C. § 6212(A)] BY ORDINARY MAIL INVALIDATE THE NOTICE NOTWITHSTANDING ITS ACTUAL RECEIPT BY THE TAXPAYER?

II. SHOULD A TAX COURT STIPULATION AGREEING TO BE BOUND BY THE DECISION IN ANOTHER CASE BE SET ASIDE WHEN A GOOD-FAITH DEFENSE IS NOT MADE IN THAT CASE?

PARTIES TO THE PROCEEDING

The names of all parties to the within proceeding appear in the caption of the case.

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REPORTS OF OPINIONS

The decision of the Fourth Circuit Court of Appeals below is found at *Balkissoon vs. Commissioner of Internal Revenue*, 995 F.2d 525 (4th Cir. 1993). A copy of this decision may be found at Apx 1.

The decision of the Tax Court below is found in *Balkissoon vs. Commissioner of Internal Revenue*, T.C. Memo 1992-322, 63 TCM (CCH) 3104 (1992). A copy of this decision may be found at Apx 11.

STATEMENT OF JURISDICTION

(a) The date of the entry of the judgment or decree sought to be reviewed is June 11, 1993.

(b) There were no orders respecting a rehearing, or any other order granting an extension of time within which to file a petition for a writ of certiorari.

(c) Rule 12.3 has no applicability in the within case.

(d) The statutory provision believed to confer jurisdiction on this Court to review the judgment or decree in question is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

26 U.S.C. § 6212(a)
26 U.S.C. § 6213(a)
26 U.S.C. § 6213(c)
26 U.S.C. § 6303

26 U.S.C. § 7483
28 U.S.C. § 1254

The complete text of these statutes appears in the Appendix

CONCISE STATEMENT OF THE CASE

On or about May 5, 1986,[1] Appellee mailed Appellants a notice of deficiency (the "Notice") pursuant to 26 U.S.C. § 6212(a) *by ordinary mail.* A petition was filed with the United States Tax Court seeking a redetermination of the deficiency.[2]

Early in the Tax Court proceeding, Appellants signed a Stipulation of Settlement (Apx. 21), agreeing that adjustments to their taxes would be determined as if they were parties in the then-pending case of *Zimmerman v. Commissioner*. Unfortunately, Mr. Zimmerman failed to adequately present his case or represent Appellants' interests at trial. Mr. Zimmerman's counsel (who also represented Appellants at an earlier stage of this proceeding) stated that, among other defects, "Mr. Zimmerman refused to finance engineering reports to verify that there in fact were commercial quantities of marketable coal in [the] proper-

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1 The Notice of Deficiency bears the date "May 5, 1986;" however, since it was sent by ordinary mail, it is impossible to determine the date it was actually mailed. See discussion *infra*.

2 Although both the Tax Court and the Fourth Circuit found that the petition was timely filed, the issue of timeliness is based on a determination of when the Notice of Deficiency was *mailed*. Since it is impossible to know when the Notice was mailed (because it was sent by regular mail instead of certified or registered mail), it is also impossible to know whether the petition was timely filed. See discussion *infra*.

ties. Mr. Zimmerman would not finance travel payment to witnesses to substantiate that in fact a portion of the $7,000,000.00 received from mining paid down the notes. . . . Mr. Zimmerman refused to pay for any contrary expert analysis or opinion [to refute the I.R.S.'s expert]." Mr. Zimmerman even refused to pay his attorney, who filed a Motion to Withdraw (which was not granted). This was notwithstanding Appellants' contribution of $1,000 towards Mr. Zimmerman's litigation costs. Nevertheless, the Tax Court held that Appellants would be bound by the *Zimmerman* decision and the stipulation.

The remaining issues were tried on December 13, 1991, before the Honorable Jules G. Körner, III, who held that the Notice need not be mailed by certified or registered mail (Apx 11).

On August 31, 1992, Appellants filed a timely appeal to the United States Court of Appeals for the Fourth Circuit. Jurisdiction in the Court of Appeals was based upon 26 U.S.C. § 7483, since an appeal was taken from a final order of the United States Tax Court that disposed of all claims with respect to the parties as raised in the petition filed with the Tax Court. The date of the Order appealed from was June 8, 1992, and the Notice of Appeal was filed on August 31, 1992, within the ninety-day appeal period established by 26 U.S.C. § 7483 and Rules of Appellate Procedure Rule 13(a). On June 11, 1993, the Court of Appeals entered its decision, holding that a Notice actually received by the taxpayer need not be sent by registered or certified

mail, and finding that the Tax Court did not abuse its discretion in refusing to set aside the stipulation.

A petition for a writ of certiorari was timely filed with this Court on September 9, 1993.

ARGUMENT

I. DOES THE SENDING OF A NOTICE OF DEFICIENCY [26 U.S.C. § 6212(A)] BY ORDINARY MAIL INVALIDATE THE NOTICE NOTWITHSTANDING ITS ACTUAL RECEIPT BY THE TAXPAYER?

The seminal question on this issue is what 26 U.S.C. § 6212(a) means. This section states in pertinent part:

> If the Secretary determines that there is a deficiency in respect of any tax . . . he is authorized to send notice of such deficiency to the taxpayer by certified or registered mail.

Focused even more narrowly, the question is what the words "is authorized to" mean. If these words mean "required," it is clear that the Commissioner failed to send the Notice to Appellants by certified or registered mail and that the deficiency imposed thereby is barred by the statute of limitations. 26 U.S.C. § 6213(c). On the other hand, if this language is discretionary where the taxpayer receives actual notice, as was held by the Court of Appeals, sending the Notice by regular mail complies with the statute's obligations.

This issue has never been addressed by this Court. In light of the unclear language used in the statute, the legislative history of this particular section and the application of this statute by the Courts of Appeals, this is a matter appropriate for resolution by this Court.

Notwithstanding its holding in *United States v. Ball*, 326 F.2d 898, 901 (4th Cir. 1964) ("The failure to send notice by registered mail in compliance with § 6212(a) is fatal to a jeopardy assessment . . ."), the Court below held that the registered/certified mailing requirements of § 6212(a) are merely a "safe harbor to be relied upon only in those situations in which the taxpayer did not receive actual notice." *Balkissoon v. Commissioner*, 995 F.2d 525, ___ (4th Cir. 1993). Such an interpretation, however, is nowhere to be found in the language of the statute or its legislative history.

Actual notice is required, for example, in service of civil pleadings, FRCP Rule 4(d)(1). Merely mailing the notice or leaving it at the taxpayer's residence is sufficient under 26 U.S.C. § 6303. Section 6212(a) is unique in its use of registered or certified mail for service. And if "authorized to send" is permissive only in cases of actual notice, the words "by certified or registered mail" are useless verbiage with no meaning.

Requiring that a Notice be mailed by certified or registered mail serves several purposes. If signed for by the taxpayer, it establishes that the Notice was actually received, the date it was received and who

received it. If it is refused, the Commissioner knows that the taxpayer received the Notice but refused to pick it up. If it is unclaimed or returned for a bad address, the Commissioner knows that the taxpayer did not receive the Notice and may wish to make additional efforts to determine the taxpayer's correct address.

Of prime importance, however, sending a Notice by certified or registered mail firmly establishes the date of mailing from which the time for filing a Petition can be determined. *See* 26 U.S.C. § 6213(a); *DiViaio v. Commissioner*, 539 F.2d 231, 234 (D.C.Cir. 1976). If a Notice is sent by regular mail, posted or left at the taxpayer's residence, there is no assurance the taxpayer received the Notice, and no indication at all of when the Notice was mailed.[3]

Had Congress intended the standard to be actual notice, it would have required actual notice to be given. Had it required only that the notice be sent, without the means of sending mattering, there would have been no need to include the words "certified or registered mail." Instead, Congress artfully crafted a compromise between these two extremes. By requiring mailing by certified or registered mail to

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3 Even in the case of personal delivery to the taxpayer, it is an interesting question of when the Notice is deemed "mailed" for the purposes of § 6213(a). This section does not seem to start the 90 day time for filing a petition running until after the Notice is *mailed*; it states nothing about actual receipt of the Notice starting the clock.

the taxpayer's last known address,[4] without adding the proviso that the taxpayer actually receive notice, Congress devised a means for insuring that the taxpayer would be likely to receive actual notice without imposing the burdens on the Commissioner that requiring actual notice would create.

Section 6213(a) and (c) both refer to the Petition being "mailed." Section 6213 states in pertinent part:

> (a) Within 90 days . . . after the notice of deficiency authorized in section 6212 is *mailed* . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . . [N]o assessment of a deficiency in respect of any tax . . . shall be made, begun, or prosecuted until such notice has been *mailed* to the taxpayer . . .
>
> (c) If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, *notice of which has been mailed to the taxpayer*, shall be assessed, and shall be paid upon notice and demand from the Secretary.

(Emphasis added.) If this Court were to allow the Fourth Circuit decision that the mode of service of a Notice matters not where actual notice is given to stand, the clear language of § 6213—much clearer than that contained in § 6212(a)—would have to be judicially changed. And

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[4] Appellee has argued that the words "is authorized to" in § 6212(a) indicate merely a permissive intent. In the legal context, however, "authorize" carries a mandatory meaning. Black's Law Dictionary, 4th edition, defines "authorize" as "To empower; to give a right or authority to act. . . . *It has a mandatory effect or meaning*, implying a direction to act." (emphasis added).

this change creates even more questions. When would the time period for filing a Petition begin to run? If, for example, it were to be determined from the date of actual notice, the Court would be rewriting the statute to add the words "or actual notice" following "mailed." And it does not end here. What if a taxpayer receives a Notice by ordinary mail one week before it is sent by certified mail? Does the date of mailing or the date of actual control? What if the taxpayer receives actual notice but does not file a timely petition with the Tax Court? Would the Fourth Circuit's "safe harbor" still apply?

By opening this Pandora's box, the Fourth Circuit has loosed problems such as this on the Courts. An absolute rule requiring that a Notice be mailed by certified or registered mail in all cases avoids this.

While the actual language Congress used in § 6212(a) was not as unambiguous as it could have been,[5] in committee the legislature made its intentions crystal clear. When § 6212(a) was amended to its current form in 1958 by adding certified mail as a means of notice, the legislative history found in Pub. L. No. 85-866, 1958 U.S. CODE, CONG. & ADMIN. NEWS (90 Stat.) 4890-4891, shows that Congress intended the certified or registered mailing requirements of this section to be mandatory:

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5 In fact, the Third Circuit referred to the "lack of precision" of § 6212(a) and (b) and rather wryly noted that, "They are not models of draftsmanship." *Berger v. Commissioner*, 404 F.2d 668, 672 (3rd Cir. 1968).

> **Section 97—Use of certified mail**
>
> Several provisions of the Internal Revenue Code now provide for the use of registered mail, both by the Internal Revenue Service and by taxpayers. For example, the Service *is required to use registered mail in issuing notices of deficiency* and notices relating to the disallowance of claims. . . .
>
> Accordingly, the House bill amends the code to provide that *wherever the use of registered mail is presently required,*[6] either certified or registered mail may be used. . . .

(Emphasis added.) This language is plain, clear and concise. It unequivocally states that "the Service is *required* to use registered mail in issuing notices of deficiency . . ." It allows the Service to use certified mail "wherever the use of registered mail is presently *required* . . ." *Id.* (emphasis added). This language makes Congress' intentions concerning § 6212(a) apparent: service by certified or registered mail is not optional, it is required.

The legislative history of a statute is one of the best means of ascertaining legislative intent. *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *Garcia v. United States*, 469 U.S. 70, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984). In *Garcia*, the Court stated, "In

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6 Given this wording, if registered mail was not *required*, the amendment allowing service by certified mail might not have been intended to apply to § 6212(a).

surveying legislative history we have repeatedly stated that the authoritative source for finding the legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collected understanding of those Congressmen involved in drafting and studying the proposed bill.'" *Id. at* 76, 105 S.Ct. at 483 (quoting *Zuber v. Allen*, 396 U.S. 168, 186, 90 S.Ct. 314, 324, 24 L.Ed.2d 345 (1969)).

Since the citation from U.S. Code, Cong. & Admin. News is just such a report (the cited section is from the Senate and Conference Committee Reports on the bill), and the Reports show Congress' clear intention that § 6212(a) be mandatory, such an interpretation should be viewed as authoritative, conclusive and binding. It should be adopted by this Court.

Curiously, although this section was specifically cited to the Court of Appeals in Appellants' brief below, no reference to it appears in the Court's opinion. Nor has it been cited in any of the other decisions referred to in the opinion. However, it is there. It is clear. And it is given great weight.

Appellants' interpretation is not without judicial support.

In *Keado v. United States*, 853 F.2d 1209, 1211-13 (5th Cir. 1988), the Court reviewed a District Court decision finding that a Notice had been properly sent. After examining the applicable statutes, the

court went on to discuss the requirements those statutes imposed. It stated:

> First, before beginning a collection activity, the IRS *must* notify a taxpayer of the deficiency by mailing him a notice of deficiency by certified or registered mail.
>
> * * *
>
> The relevant statutes simply *require* that the IRS mail a deficiency notice by certified or registered mail to a taxpayer's last known address. I.R.C. § 6212(a) . . . The IRS has, however, established detailed procedures for mailing deficiency notices. [Here follows a lengthy quote from the Internal Revenue Manual] Complete compliance with these established procedures would provide sufficient proof of mailing. *United States v. Zolla*, 724 F.2d 808, 810 (9th Cir.), *cert. denied*, 469 U.S. 830, 105 S.Ct. 116, 83 L.Ed.2d 59 (1984) (Form 3877 is highly probative and is sufficient, in the absence of contrary evidence, to establish that the notices of deficiency were properly sent) . . .

(Emphasis added.)

In *Hoffenberg v. Commissioner*, 905 F.2d 665, 667 (2nd Cir. 1990), one issue was whether the absence of Postal Service records showing receipt by the taxpayer of the Notice precluded a finding that the Notice was properly sent. The Court stated:

> The Commissioner's burden of proof is to establish that the Notice of Deficiency was mailed *by certified mail* to petitioner's last known address. No proof of receipt is required. In light of our finding that the address was correct, the Commissioner's receipt for mailing the Notice satisfies his burden of proof.

(Emphasis added, citation omitted.)

The IRS's sending of a Notice by ordinary mail was held to fall "far short" of the § 6212(a) requirements in *D'Andrea v. Commissioner*, 263 F.2d 904, 907 (D.C. Cir. 1959).

While none of these cases deal with a situation where the taxpayer receives actual notice of a Notice sent by regular mail, they are reflective of the mandatory nature of the § 6212(a) requirements.

As was noted in the Fourth Circuit opinion, several circuits disagree with the interpretation of § 6212(a) asserted by Appellants. *See, e.g., Berger v. Commissioner*, 404 F.2d 668 (3d Cir. 1968); *Boren v. Riddell*, 241 F.2d 670 (9th Cir. 1957). It should be pointed out, however, that in none of these cases is the legislative history discussed *supra* addressed.

II. SHOULD A TAX COURT STIPULATION AGREEING TO BE BOUND BY THE DECISION IN ANOTHER CASE BE SET ASIDE WHEN A GOOD-FAITH DEFENSE IS NOT MADE IN THAT CASE?

The primary issue here is whether the Tax Court erred in its application of Tax Court Rule 91(e). This Rule states in pertinent part:

> A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, *except that it may do so where justice requires.*

(Emphasis added.) The question of "where justice requires" has been litigated to a fair extent, and the Tax Court is generally not reluctant to relieve a party of a stipulation where adequate justification is shown. *See, e.g., Shaw v. Commissioner*, 1991 T.C. Memo 424 (1991); *Bullock's Department Store, Inc. v. Commissioner*, T.C. Memo 1973-249 (1973); *Berry v. Commissioner*, 254 F.2d 471 (9th Cir. 1957); *Brast v. Winding Gulf Colliery Co.*, 94 F.2d 179 (4th Cir. 1938). *See generally Morrison v. Genuine Parts Co.*, 828 F.2d 708 (11th Cir. 1987), *cert. denied*, 484 U.S. 1025 (1988); *A & A Sign Co. v. Maughan*, 419 F.2d 1152, 1155 (9th Cir. 1969) ("The bankruptcy court in exercise of its equitable powers can set aside a stipulation entirely if the interests of justice so require and if the parties can be returned to the positions they occupied before they entered into the stipulation.")

In the within case, the Tax Court never determined whether justice required the Stipulation to be set aside. It performed a cursory analysis of Appellants' proffers as to the testimony its experts would offer and, without holding a hearing or any further discussion, denied Appellants' request.

The Fourth Circuit, without addressing the issues of the Tax Court's procedural failures or the question of whether justice required the stipulation to be set aside, merely restated the Tax Court's "analysis" and found for Appellant.

It may be of assistance to the Court to set forth some of the facts which should have formed the basis for a finding that substantial justice required the setting aside of the stipulation.

Appellants signed a stipulation in the Tax Court case (the "Stipulation") agreeing to be bound by the Court's decision in *Zimmerman v. Commissioner*, decided at T.C. Memo 1987-534. Perhaps one of the reasons for agreeing to the Stipulation was the fact that Appellants' counsel in 1988, William Randolph Klein, was Mr. Zimmerman's counsel as well. Regardless, as was noted in Appellants' Response to Respondent's Motion for Order to Show Cause in the Tax Court, Appellants

> agreed to be bound by this [*Zimmerman*] litigation on the assumption that Mr. Zimmerman would permit us [Mr. Zimmerman's attorney] to provide a proper case. Mr. Zimmerman failed to provide us with funds to bring in witnesses or to obtain proper engineering evaluation and other back-up material[. . . . Appellants] relied on Mr. Zimmerman's cooperation.

See also Apx. 26 ("Mr. Balkissoon believed that in his trial Mr. Zimmerman would in fact expend adequate funds to properly defend his position; Mr. Zimmerman opted not to do so.") Mr. Zimmerman did not even pay Mr. Klein, his attorney, who unsuccessfully attempted to withdraw from his representation. *Id.*

After becoming aware of Mr. Zimmerman's lack of action in properly preparing for trial, Appellants, at their own expense, retained

their own experts, who were prepared to refute the Commissioner's experts' report. Unfortunately, since Appellants were not allowed to participate in the *Zimmerman* trial, they were unable to present these experts' testimony.

In its Response to Petitioners' Response to Order to Show Cause, Apx 30, Appellee spent all but one paragraph arguing that the proffered testimony of Appellants' experts did not contradict the evidence of its expert presented at the *Zimmerman* trial. In that one paragraph, Appellee dealt with the substantive basis asserted for setting aside the Stipulation:

> In each case a petitioner can always assert that they [sic] would have done it better or would have done it differently. That option, of course, was always available to petitioners. Petitioners simply could have refrained from executing the Stipulation of Settlement.

Id. at 59. This statement overlooks the fact Petitioner had signed the Stipulation some ten months before the *Zimmerman* trial. However, there is a more fatal flaw to this reasoning: when Petitioners signed the Stipulation, they believed that Mr. Zimmerman would present a good-faith defense to the claims asserted by Appellee. Their belief was misplaced. Mr. Zimmerman did not mount a good-faith defense, and it was for this reason that Appellants sought to have the Stipulation set aside.

Appellants do not argue that they would have done it better or differently. Rather, they argue that Zimmerman did not do it at all.

The Tax Court had failed to hold a hearing as indicated in its Order to Show Cause and neither the Tax Court nor the Fourth Circuit addressed the issues of Mr. Zimmerman's failure to present a good-faith defense.

As a matter of law the stipulation should be set aside.

Wherefore, Appellants pray that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, order briefs and hear oral argument on the matters raised in this Petition.

Respectfully submitted,

BRETT WEISS, P.C.

By:_____

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Certificate of Service

I Hereby Certify that a copy of Appellants' Petition for Writ of Certiorari was mailed, postage prepaid, this 9th day of September, 1993, to: David Shuster, Esquire, Counsel for the Commis-

sioner of Internal Revenue, Appellate Section, Tax Division, Department of Justice, Post Office Box 502, Washington, D.C. 20044.

BRETT WEISS

Appendix

Opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

The decision of the United States Court of Appeals for the Fourth Circuit may be found at pages Apx 1 through Apx 10.

Any other opinions, orders, findings of fact, and conclusions of law rendered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry.

The following opinions, orders, findings of fact and conclusions of law of the United States Tax Court in *Balkissoon v. Commissioner*, Tax Court No. 86-32121, were entered on the date set forth next to the description of the document:

Document	*Date*	*Apx Page*
Memorandum Findings of Fact and Opinion	June 8, 1993	11
Stipulation of Settlement	November 28, 1986	22
Petitioners' Response to Order to Show Cause	September 20, 1989	24
Respondent's Response to Petitioners' Response to Order to Show Cause	July 23, 1990	30

Any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry.

None.

The judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in USSC Rule 14(k)(i).

None

Any other appended materials.

26 U.S.C. § 6212(a)

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B of chapter 41, 42, 43, 44, or 45, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

26 U.S.C. § 6213(a), (c)

(a) Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitles A or B of chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * *

(c) If the taxpayer dies not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

26 U.S.C. § 6303

(a) Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

(b) Except where the Secretary believes collection would be jeopardized by delay, if any tax is assessed prior to the last date prescribed for payment of such tax, payment of such tax shall not be demanded under subsection (a) until after such date.

26 U.S.C. § 7483

Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BASDEO BALKISSOON; GLORIA BALKISSOON,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 92-2078

Appeal from the United States Tax Court.
(Tax Ct. No. 86-32121)

Argued: May 7, 1993

Decided: June 11, 1993

Before ERVIN, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

Affirmed by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Phillips and Judge Murnaghan joined.

COUNSEL

ARGUED: Brett Weiss, Olney, Maryland, for Appellants. David Alan Shuster, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** James A. Bruton, Acting Assistant Attorney General, Gary R. Allen, Gilbert S. Rothenberg, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

ERVIN, Chief Judge:

On May 5, 1986, the Commissioner of Internal Revenue ("Commissioner") mailed by regular post a notice of deficiency to Basdeo and Gloria Balkissoon ("Taxpayers") detailing a $33,268.58 deficiency in Taxpayers' 1981 federal income tax paid. By way of the notice of deficiency, the Commissioner also assessed tax additions due to negligent failure to file pursuant to Internal Revenue Code ("IRC") sections 6651(a)(1), 6653(a)(1), and 6653(a)(2), and interest on the deficiency pursuant to IRC section 6621(d).[1] Taxpayers made a timely petition to the United States Tax Court for review of the deficiency and additions on July 21, 1986. In two separate orders[2] the tax

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[1]The sections of the IRC authorizing the applicable tax additions provide, in pertinent parts, that

> [i]n case of failure . . . to file any return required . . . on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate . . .

26 U.S.C.A. § 6651(a)(1) (West Supp. 1989). Additions also are authorized under sections 6653(a)(1) and 6653(a)(2):

> If any part of any underpayment . . . of tax required to be shown on a return is due to negligence (or disregard of rules or regulations), there shall be added to the tax an amount equal to 5 percent of the underpayment. . . . There shall not be taken into account under this subsection any portion of an underpayment attributable to fraud with respect to which a penalty is imposed under subsection (b).

Id. §§ 6653(a)(1) & (2).

The Commissioner adds interest to a taxpayer's taxes due when the taxpayer makes a substantial underpayment and that underpayment is attributable to tax-motivated transactions. *Id.* § 6621(c).

[2]The tax court issued two orders, one on November 16, 1990 by Judge John J. Pajak reviewing the assessment of additions and interest pursuant

court affirmed the Commissioner's imposition of the deficiency and the additions. Taxpayers appeal directly to this court from the tax court pursuant to 26 U.S.C.A. § 7482.[3] Finding no error in the orders of the tax court, we affirm.

I

Taxpayers filed a joint federal tax return for the 1981 tax year. The form was mailed on August 20, 1982, and was received by the Internal Revenue Service ("IRS") on August 30, 1982. At no time prior to the receipt of the 1981 tax-year filing did the IRS receive a request for an extension beyond the April 15, 1982 deadline from Taxpayers. On their 1981 return, Taxpayers claimed substantial losses suffered by Satin Sewell Mining Program and Satin Sewell #2 Mining Association, two partnerships in which Taxpayers had invested as limited partners.

The Commissioner determined that these losses were impermissible deductions and, on May 5, 1986, mailed Taxpayers a notice of deficiency by regular post. On July 21, 1986, Taxpayers made a timely petition to the tax court for a redetermination of the deficiency.[4] Taxpayers also entered into a stipulation of settlement with the Commissioner. Under the terms of the stipulations, the parties agreed to

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to the parties' stipulations and one on June 8, 1992 by Judge Jules G. Korner, III affirming the adequacy of the Taxpayers' notice of deficiency and the determination of the deficiency.

[3]Section 7482 provides that

> [t]he United States Court of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury . . . .

26 U.S.C.A. § 7482(a)(1) (West Supp. 1989).

[4]If a taxpayer chooses to challenge a deficiency, she must file a petition with the tax court for a redetermination of the deficiency within 90 days after the notice of deficiency is mailed. 26 U.S.C.A. § 6213(a) (West Supp. 1989).

be bound by the outcome of *Zimmerman v. Commissioner*, a factually identical case already before the tax court. The parties also agreed that the applicability of section 6621(c) additions to the tax liability would be determined by the outcome in *Zimmerman*.

The tax court filed its opinion in *Zimmerman* on October 20, 1987. *See Zimmerman v. Commissioner*, No. 4661-85, 1987 Tax Ct. Memo LEXIS 526 (Oct. 20, 1987). The court held that the taxpayer in that case was not entitled to his claimed partnership losses based on the finding that the partnership was not "organized and operated with the primary objective of realizing an economic profit." *Zimmerman*, 1987 Tax Ct. Memo LEXIS 526, at *37-38. The *Zimmerman* court also found that the underpayment of tax was a tax-motivated transaction subject to the penalty provisions of section 6621(c). *Id.* at *48-50.

About five months after the tax court issued its opinion in *Zimmerman*, it ordered the parties in this case to submit a computation and stipulated decision or alternatively to demonstrate just cause why a decision should not be entered. Taxpayers responded that the taxpayer in *Zimmerman* had failed to put forth a good faith defense, and that they could establish, by expert testimony, that the losses were deductible. The tax court rejected Taxpayers' contentions, mainly based on a determination that Taxpayers' expert testimony would be irrelevant to the substantiation of deductible losses. Therefore, the tax court concluded that the parties were bound by the stipulations. The tax court did rule, however, that Taxpayers were not subject to section 6653(a)(1) and 6653(a)(2) additions. The tax court then restored the case to the general docket for trial to resolve any remaining issues.

At their December 13, 1991 trial, Taxpayers raised the jurisdictional issue of the inadequacy of their notice of deficiency. Taxpayers pointed to IRC section 6212(a), which "authorize[s the Commissioner] to send notice of . . . deficiency to the taxpayer by certified mail or registered mail." 26 U.S.C.A. § 6212(a) (West Supp. 1989). Taxpayers testified that they had received the notice of deficiency by ordinary mail sometime in May 1986. The Commissioner was unable to prove certified or registered delivery, leading Taxpayers to contend that the notice was invalid and could not serve as the basis for the assessment of a deficiency and penalties.

The tax court held that the Commissioner was not required to send notices of deficiency by registered or certified mail, and therefore upheld the determination of deficiency. As to the penalties, the tax court held that the section 6621(c) adjustments were controlled by the stipulations and that these adjustments should be made on the basis of the court's prior opinion in *Zimmerman*. The tax court reiterated its prior conclusion that Taxpayers were not subject to section 6653(a)(1) and (2) additions. Finally, the court held that the addition to tax pursuant to section 6651(a)(1) was appropriate.[5] Taxpayers appeal the adequacy of the notice of deficiency, the enforceability of the stipulations, and the assessment of additions pursuant to sections 6621(c) and 6651(a)(1).

II

This appeal presents three issues: (1) whether a notice of deficiency actually received by Taxpayers without prejudicial delay is valid despite the fact that it was not sent by certified or registered mail; (2) whether the tax court abused its discretion in refusing to relieve Taxpayers from their stipulations binding them to certain issues in a related tax court case; and (3) whether certain additions and interest charges were properly assessed against Taxpayers.

The application of the notice requirements of IRC section 6212(a) is a question of law which we review *de novo*. *See Scar v. Commissioner*, 814 F.2d 1363, 1366 (9th Cir. 1987). Whether a stipulation entered into by parties to a tax case should be set aside is a matter within the sound discretion of the tax court, which we review for an abuse of that discretion. *See Marshall v. Emersons, Ltd.*, 593 F.2d 565, 568 (4th Cir. 1979). The additions and interest charges not found to be governed by the stipulations are proper unless their assessment represents an abuse of discretion.

[5]Taxpayers failed to raise objection to the section 6651(a)(1) addition in their Second (and final) Amended Petition. The tax court concluded that the Taxpayers had abandoned their challenge to the section 6651(a)(1) addition.

A.

IRC section 6212(a) provides that "[i]f the Secretary determines that there is a deficiency in respect of any tax . . ., he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail." 26 U.S.C.A. § 6212(a) (West Supp. 1989). The issue in this case centers on whether the section 6212 authorization is mandatory or permissive. Taxpayers suggest that section 6212(a) mandates the use of registered or certified mail. The Commissioner contends that the statute's language provides a safe harbor—a method of notice by which the Commissioner can be guaranteed that the limitations period for filing a petition of redetermination begins to run. If it uses a method of delivery for notices of deficiency other than registered or certified mail, the Commissioner contends, it gains no benefit from the section 6212(a) safe harbor and must prove that the taxpayer actually received the notice before it can benefit from the expiration of the period for filing a petition of redetermination.

Taxpayers rely on our decision in *United States v. Ball*, 326 F.2d 898 (4th Cir. 1964), to support their position. In *Ball* there was some question as to whether the taxpayer, who had been out of the country since filing the tax form from which the deficiency in question derived, had ever received actual notice of the deficiency. Addressing the sufficiency of the notice, we said that

> notice under § 6212(a) must be by registered mail. . . . The failure to send notice by registered mail in compliance with § 6212(a) is fatal to a jeopardy assessment, during the period that § 6212(a) permitted only notice by registered mail.[6]

Id. at 901. In the context of determining the validity of a tax lien against a taxpayer who possibly had not received actual notice of the deficiency, we stressed the need for strict compliance with section 6212(a)'s notice requirements. Although the language used in *Ball*

[6]Under the version of section 6212(a) applicable at the time *Ball* was decided, the Commissioner was authorized to use only registered mail. Congress later amended the statute to include certified mail as well. Pub. L. No. 85-866, § 89(b), 72 Stat. 1661, 1665 (1958) (codified as amended at 26 U.S.C.A. § 6212(a) (West Supp. 1989)).

seems to mandate the use of registered mail, the holding is limited to the situation in which the Commissioner does not have evidence of actual notice and must rely on the safe harbor of section 6212(a) to establish compliance with the IRC's notice requirements.

Section 6212(a) does not require that the taxpayer actually receive the notice of deficiency. Instead, the Commissioner must show only that it sent a notice by registered or certified mail to the taxpayer's last known address. *Jones v. United States*, 889 F.2d 1448, 1450 (5th Cir. 1989). As the Fifth Circuit described it,

> [t]he statutory scheme . . . provides a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer.

Id. If the taxpayer actually does receive notice of deficiency by some method of delivery, the Commissioner's failure to comply with the authorization in section 6212(a) inviting the use of registered or certified mail proves to be a technical, but harmless violation.

The circuits that have addressed this issue directly all have reached this conclusion, holding in essence that "a notice of deficiency that is actually received without delay prejudicial to the taxpayer's ability to petition the Tax Court is sufficient to toll the statute of limitations as of the date of mailing." *Scheidt v. Commissioner*, 967 F.2d 1448, 1450-51 (10th Cir.), *cert. denied*, 113 S. Ct. 811 (1992); *see also Mulvania v. Commissioner*, 769 F.2d 1376, 1378 (9th Cir. 1985) (holding that "a notice of deficiency actually, physically received by a taxpayer is valid under § 6212(a) if it is received in sufficient time to permit the taxpayer, without prejudice, to file a petition to the Tax Court even though the notice is erroneously addressed"); *Pugsley v. Commissioner*, 749 F.2d 691, 693 (11th Cir. 1985) (holding that technical violation of not sending notice to "last known address" was not prejudicial because taxpayer received actual notice of deficiency with ample time remaining to file a petition); *Clodfelter v. Commissioner*, 527 F.2d 754, 756 (9th Cir. 1975) (holding that section 6212(a) deals only with those instances in which actual notice was not given or can-

not be proved), *cert. denied*, 425 U.S. 979 (1976); *Berger v. Commissioner*, 404 F.2d 668, 673 (3d Cir. 1968) (holding that section 6212(a) authorization that notice of deficiency be sent by registered or certified mail does not forbid any other method of notice), *cert. denied*, 395 U.S. 905 (1969); *Boren v. Riddell*, 241 F.2d 670, 672-74 (9th Cir. 1957) (holding that essential purpose of statute was accomplished when taxpayer got actual notice in sufficient time to petition tax court despite technical violation of not using registered mail); *cf. Powell v. Commissioner*, 958 F.2d 53, 56 (4th Cir.) (invoking section 6212(a) safe harbor in situation in which the notice was admittedly not delivered to taxpayers), *cert. denied*, 113 S. Ct. 440 (1992).

In this case Taxpayers readily admit that they received the notice of deficiency and were able to petition the tax court for redetermination. Therefore, any prejudice to them associated with the failure of the Commissioner to send the notice by registered or certified mail is inconsequential. Following the lead of the other circuits that have addressed the issue, we identify section 6212(a) as a safe harbor to be relied upon only in those situations in which the taxpayer did not receive actual notice. Such is not the case for Taxpayers; therefore, their notice of deficiency was valid upon timely receipt.

B.

Next, Taxpayers challenge the enforceability of the stipulations in which they entered with the Commissioner to control the outcome of their case. Tax Court Rule 91(e) states:

> A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires.

Tax Ct. R. 91(e). The tax court's decision whether to relieve a party from a previous stipulation should "not ordinarily be interfered with, except where a manifest abuse of discretion is disclosed." *Brast v. Winding Gulf Colliery Co.*, 94 F.2d 179, 181 (4th Cir. 1938).

In this case Taxpayers demonstrate disapproval of the way Zimmerman defended his case and now seek to be released from the outcome of the *Zimmerman* case. Taxpayers argue that the parties were mutually mistaken about Zimmerman's willingness to defend his case and therefore should be relieved of their duty to comply with the stipulations.[7] Taxpayers' contentions are meritless. They are unhappy with the fact that Zimmerman lost and that they are bound by that outcome. They cannot make out any conceivable theory to support mutual mistake, as the Commissioner did not believe at any time that Zimmerman or the other partners had a defense to the nonpayment of taxes based on spurious partnership loss deductions. Therefore, we conclude that the tax court did not abuse its discretion by binding Taxpayers under the stipulations.

C.

Finally, Taxpayers seek to avoid the imposition of additions and interest. Once the Commissioner makes an assessment, the assessment is presumed correct and the taxpayer bears the burden of establishing the absence of the necessary elements forming the basis of the assessment. *Business Ventures Internat'l v. Olive*, 893 F.2d 641, 646 (3d Cir. 1990); *Hall v. Commissioner*, 729 F.2d 632, 635 (9th Cir. 1984). Therefore, the Commissioner need only establish the basis for the addition, and it did so in its notice of deficiency. Without presenting evidence to the contrary, Taxpayers cannot avoid the conclusion that their failure to pay was in violation of the IRC and subject to penalty. Taxpayers suggest no reason why the imposition of the additions was in error. They merely assert that the tax court did not discuss the additions specifically in its order and that the absence of specific reference precludes their assessment. The absence of specific reference actually appears to mean that the additions were uncontested before the tax court. *See supra* note 5. Taxpayers have demonstrated no substantive reason why they should be allowed to avoid the additions.

[7]Taxpayers contend that, through testimony and an expert report, they can establish the validity of the contested deduction. The tax court carefully reviewed the nature and content of the evidence and determined that it either was repetitive of that presented in the *Zimmerman* case or irrelevant.

III

Taxpayers have failed to establish the inadequacy of their notice of deficiency, the unenforceability of the stipulations, or the invalidity of the additions to tax made by the Commissioner. Therefore, the orders of the tax court are

AFFIRMED.

T.C. Memo. 1992-322

UNITED STATES TAX COURT

BASDEO BALKISSOON AND GLORIA BALKISSOON,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 32121-86. Filed June 8, 1992.

Brett Weiss, for petitioners.

Ronald D. Pinsky and *James F. Hogan*, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

KÖRNER, *Judge:* By notice of deficiency dated May 5, 1986, respondent determined with respect to petitioners' 1981 Federal income tax a deficiency in the amount of $33,268.58; additions to tax

pursuant to section 6653(a)(1)[1] and (2); an addition to tax under section 6651(a)(l): and liability for increased interest on the deficiency pursuant to section 6621(c), formerly section 6621(d).[2]

The issues for decision are: (1) Whether the period of limitations for the year at issue was validly extended; and (2) whether the notice of deficiency in this case was defective, because, petitioners allege, it was improperly mailed.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found; the stipulation and the accompanying exhibits are incorporated herein by this reference.

Petitioners Basdeo and Gloria Balkissoon resided in Bethesda, Maryland, at the time the petition in this case was filed.

Petitioners' joint Federal income tax return for 1981 was filed on August 30, 1982. A Special Consent to Extend the Time to Assess Tax, Form 872-A (hereinafter Form 872-A or extension), for 1981 was executed by petitioners on April 12, 1985. James O'Brien (O'Brien), a duly authorized employee of respondent's district director, signed the

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1 All statutory references are to the Internal Revenue Code as in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure, except as otherwise noted.

2 The issues involving the deficiency, the additions to tax, and the increased interest were resolved by this Court's Memorandum and Order dated Nov. 16, 1990, except for the addition to tax pursuant to sec. 6651(a)(l) which is deemed abandoned as the result of this Court's Order dated Sept. 25, 1991.

extension on May 20, 1985. The Form 872-A was not executed by an employee of the regional director of Appeals.

Respondent mailed the statutory notice of deficiency for 1981 on May 5, 1986, signed by the district director of respondent. It was received by petitioners, and they timely filed their petition on July 21, 1986.

OPINION

The first issue we address is whether the Form 872-A, the purpose of which is to extend the period of limitations indefinitely, was properly executed by respondent prior to the expiration of the statute of limitations for 1981. Petitioners present two arguments. They assert that, although conceding that the extension was signed by a representative of respondent, the case was at the appellate level and in such circumstances the Form 872-A could be executed only by someone authorized to do so for respondent's regional director of Appeals, which did not include O'Brien. Further, petitioners urge that Form 872-A could be used only if the case were actually in the Appeals Division. Respondent denies that the case was at the appellate level and asserts that Form 872-A may be used at the examination level. We agree with respondent.

Under section 6501(a), respondent was required to assess the deficiency, additions to tax, and increased interest involved in this case within 3 years after the return for 1981 was filed. However, section

6501(c)(4) provides that if, prior to the expiration of the statute of limitations for assessment, the Secretary and the taxpayer have consented in writing to the extension of the period of assessment, the tax may be assessed at any time prior to the expiration of the agreed period. The taxpayer has the ultimate burden of persuasion as to whether the statutory notice of deficiency was issued after the expiration of the period of limitations for the year in issue. Rule 142(a), *Kronish v. Commissioner*, 90 T.C. 684, 692 (1988); *Adler v. Commissioner*, 85 T.C. 535 (1985).

In *Adler v. Commissioner*, *supra* at 540, we set forth the procedure for analyzing a case wherein the notice of deficiency was mailed after the expiration of the period of limitations provided in section 6501(a). as follows:

> Where the party pleading such issue makes a showing that the statutory notice was issued beyond the normally applicable statute of limitations, however, such party has established a prima facie case. At that point, the burden of going forward with the evidence shifts to the other side, and the other party has the burden of introducing evidence to show that the bar of the statute is not applicable. Where the other party makes such a showing, the burden of going forward with the evidence then shifts back to the party pleading the statute, to show that the alleged exception is invalid or otherwise not applicable. * * *

In the instant case, petitioners have shown that the statutory notice was issued beyond the normal expiration of the statute of limitation under

section 6501(a). Respondent has satisfied her burden of going forward with the evidence by producing a facially valid Form 872-A. Therefore, the burden of going forward with the evidence shifts back to petitioners to show that the Form 872-A was invalid. *Adler v. Commissioner*, *supra* at 540.

Petitioners concede that respondent's district director had delegated his authority to execute the extension of the period of limitations to O'Brien, the district's chief of the examination support section in 1985. However, they argue that this case was at the appellate level when the Form 872-A was executed by O'Brien, and consequently that the Form 872-A was invalid since, they maintain, it required the signature of someone authorized to execute the extension for respondent's regional director of Appeals.

Petitioners have failed to show that the case was at the appellate level at the time the Form 872-A was executed by respondent's agent. In fact, the evidence is to the contrary. The testimony of O'Brien and the supporting documentation thereto persuade us that this case was within respondent's examination division and in suspense when the Form 872-A was executed.

Petitioners argue further that, if the case was not in respondent's Appeals Division, it was inappropriate to use the Form 872-A. However, Rev. Proc. 79-22, 1979-1 C.B. 563, upon which petitioners rely, clearly states that the Form 872-A may be used in

place of Form 872 when the case is either at the examination or appeals level.

We hold that based upon the record, petitioners have failed to satisfy their burden regarding the invalidity of the Form 872-A involved in this case. Hence, the period of limitations had not expired with respect to the year in issue at the time the notice of deficiency was mailed.

The second issue we address is whether the statutory notice of deficiency must be sent by certified or registered mail. Section 6212(a) states that "If the Secretary determines that there is a deficiency in respect of any tax * * * he is *authorized* to send notice of such deficiency to the taxpayer by *certified mail or registered mail.*" (Emphasis added.) Petitioners argue that the notice required in this section must be forwarded to them by the methods declared in the statute.

We note initially that respondent was not able to produce records showing that the notice of deficiency had been sent by either certified or registered mail. Nor were petitioners able to show (as by producing the mailing envelope for the statutory notice) that it was *not* sent by registered or certified mail. Notwithstanding this shortcoming, respondent contends that actual receipt of a notice of deficiency without prejudicial delay satisfies the statute.

This Court and several appellate courts agree with respondent that section 6212(a) does not limit the methods respondent may use to

notify taxpayers to those specified therein, if the taxpayer receives actual notice. In *McKay v. Commissioner*, 89 T.C. 1063, 1069 (1987), affd. 886 F.2d 1237 (9th Cir. 1989), we said:

> section 6212(a) merely authorizes the Secretary to send notices of deficiency by registered or certified mail. Other means of delivery may be used. The "purpose of the statutory requirement for the issuance of deficiency notices is to inform the taxpayer that the Commissioner means to assess additional taxes against him, and to provide time for the taxpayer to petition this Court for a redetermination if he is so advised." *Perlmutter v. Commissioner*, 44 T.C. 382, 400 (1965), affd. 373 F.2d 45 (10th Cir. 1967). [Fn. ref. omitted.]

See also *Miller v. Commissioner*, 94 T.C. 316 (1990); *Berger v. Commissioner*, 404 F.2d 668, 674 (3d Cir. 1968), affg. 48 T.C. 848 (1967) (holding that "The statute does not make * * * [actual receipt of notice of deficiency by the proper party within the period of limitations] inadequate merely because it authorizes an alternative mailing of notice which it makes sufficient without proof of actual delivery."); *Boren v. Riddell*, 241 F.2d 670, 673 (9th Cir. 1957) (holding that "actual notice * * * satisfies [the predecessor to section 6212(a)], and that literal compliance is unnecessary"). In fact, actual notice, even if oral, will satisfy the requirements of section 6212(a). See *Zaun v. Commissioner*, 62 T.C. 278, 280 (1974); *Mulvania v. Commissioner*, T.C. Memo. 1984-98, affd. 769 F.2d 1376 (9th Cir. 1985).

In the instant case, petitioners do not deny that they received the notice of deficiency with sufficient time to file their petition with this Court.

However, petitioners argue that the legislative history concerning an amendment to section 6212(a) supports their contention that failure to send the notice by certified or registered mail results in fatal noncompliance with the statute. They rely on the committee reports to the Technical Amendments Act of 1958 which amended section 6212(a) to authorize the use of certified mail in addition to registered mail. Sec. 6212(a), as amended by the Technical Amendments Act of 1958, Pub. L. 85-866, sec. 89(b), 72 Stat. 1665. The legislative history for that amendment states that "the Service is *required* to use registered mail in issuing notices of deficiency". H. Rept. 775, 85th Cong., Ist Sess. (1957), 1958-3 C.B. 811, 857; S. Rept. 1983, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 922, 1023. (Emphasis added.)

The function of the courts in interpreting a statute "is to construe the language so as to give effect to the intent of Congress" in enacting the legislation. *United States v. American Trucking Associations*, 310 U.S. 534, 542 (1940); see also *United States v. Pelzer*, 312 U.S. 399 (1941). In light of this mandate, we find petitioners' argument unpersuasive for several reasons. First, the development of the law regarding respondent's responsibility, in general, to provide taxpayers

with notice of a deficiency prior to assessment supports the conclusion that Congress did not intend to require that effective notice be limited to the means declared in the statute. *United States v. American Trucking Associations, supra.* The predecessor to section 6212(a) originally provided that the taxpayer "*shall* be notified of such deficiency by registered mail." Revenue Act of 1924, ch. 234, sec. 274(a), 43 Stat. 297. (Emphasis added.) In the Revenue Act of 1926, this provision was revised to read that the "Commissioner is *authorized* to send notice of such deficiency to the taxpayer by registered mail." (Emphasis added.) Revenue Act of 1926, ch. 27, 44, sec. 274(a), Stat. 55. This change from a compulsory term, which effectively precluded other forms of notification, to one permissive in nature implies that Congress contemplated the possibility of notice by other methods.[3] Cf. *Richards v. United States*, 369 U.S. 1, 9 (1962) (generally "legislative purpose is expressed by the ordinary meaning of the words used.")

Second, the language of the legislative history, cited by petitioners, is not unambiguous, for the committees may have been referring to the circumstance under which respondent may meet the requirements of section 6212(a) by constructive notice to the taxpayer. See *Berger v. Commissioner, supra.*

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[3] Subsequent to 1926, Congress reenacted sec. 274(a), Revenue Act of 1926, ch. 27, 44 Stat. 55, without material change. E.g., internal Revenue Code of 1939, ch. 2, sec. 272(a), 53 Stat. 82; Internal Revenue Code of 1954, ch. 736, sec. 6212(a), 68A Stat. 270.

Thus we conclude that Congress did not intend to preclude actual notice, without prejudicial delay, from constituting compliance with requirements of section 6212(a).

Petitioners argue further that *United States v. Ball*, 326 F.2d 898 (4th Cir. 1964), supports their position.[4] The court in that case was concerned with the issue of whether it had been proper for the District Court to grant summary judgment in favor of the Government where the record failed to establish affirmativeiy that there was no dispute regarding compliance with the notice provisions of section 6212(a). Apparently relying on the legislative history to the Technical Amendments Act of 1958, *supra*, the court stated that section 6212(a) mandated the use of registered mail for the year before them. However, the holding of *United States v. Ball*, *supra*, is not squarely in point with respect to the circumstances before us, since the court did not address the issue, such as is present in this case, whether actual notice is in itself sufficient to satisfy respondent's obligation under section 6212(a). See *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), affd. 445 F.2d 985

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4 Since this case is appealable to the United States Court of Appeals for the Fourth Circuit and since the law of this Court is that respondent is not required to send the notice of deficiency by either certified or registered mail in the context of actual notice, we treat this argument as asserting that *United States v. Ball*, 326 F.2d 898 (4th Cir. 1964), is binding on this Court under the rule of *Golsen v. Commissioner*, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971).

(10th Cir. 1971). Thus, we are not bound by *United States v. Ball, supra,* in deciding this issue.

Having considered petitioners' various arguments with respect to this issue, we hold that the statutory notice of deficiency was not invalid where it was actually received by petitioners without prejudicial delay.

In light of the foregoing holdings and prior determinations of this Court, see *supra* note 2,

> *Decision will be entered for respondent with respect to the deficiency in tax, the increased interest under section 6621(c), formerly section 6621(d), and the addition to tax under section 6651(a)(1). and for petitioners with respect to the additions to tax under section 6653(a)(1) and (2).*

UNITED STATES TAX COURT

BASDEO BALKISSOON and
GLORIA BALKISSOON,

Petitioners,

vs Docket No. 32121-86

COMMISSIONER OF
INTERNAL REVENUE

Respondent.
_____/

PETITIONERS' RESPONSE TO
ORDER TO SHOW CAUSE

The Petitioners herein file this their response to the to Show Cause and state:

This case is no different factually from Zimmerman vs Commissioner except as noted below. In addition, Petitioners have several other issues which have nothing to do Zimmerman and which should be resolved by a trier of fact.

In addition, your Petitioners have additional adjustments to their income taxes which are not applicable to Mr. Zimmerman.

In the Zimmerman case, Mr. Zimmerman refused to finance engineering reports to verify that in fact there were commercial quantities of marketable coal in both the original and substitute properties. Mr. Zimmerman would not finance travel payment to witnesses to substantiate that in fact a portion of the $7,000,000.00

received from mining paid down the notes. Petitioners have retained Ralph C. Warlow, 12601 Pinecrest Road, Herndon, Virginia, a qualified geologist, of Johnston & Associates, Resource Analysis and Earth Science, to substantiate the existence of commercial quantities of marketable coal. In the Zimmerman case, the IRS hired an engineer by the name of Bonduran* who issued a report negating the existence of marketable coal; however, Mr. Bondurant admitted he never visited the mines or the property sites. There was no evidence to refute Mr. Bondurant because Mr. Zimmerman refused to pay for any contrary expert analysis or opinion.

Mr. Balkissoon has retained these experts and these experts, in the attached report, have refuted the Bondurant report. At trial, these experts will also substantiate the existence of commercial quantities of marketable coal through core drillings.

A reading of the preliminary report of Mr. Warlow, of Johnson & Associates, substantiates the position of Petitioners.

In addition, CPA, Anthony Cupolo, an officer of Southern Eagle Mining, has obtained evidence showing that a substantial portion of the promissory notes have been paid down. Mr. Zimmerman did not have this evidence at his trial and refused to take the appropriate procedures to obtain this information. It also appears that Mr. Zimmerman may have appropriated some of the note paydown money for improper purposes.

In addition, attorney R. Mike Mullens, 324 Randolph Avenue, Elkins, West Virginia, as per attached, will testify as to the validity of the leases and sublease we intend to introduce supporting the entire mining operation.

In addition, the Southern Eagle Mining Company went into bankruptcy because of falling coal prices and flooding problems. Mr. Zimmerman would not finance an analysis of the bankruptcy court's material; however, Mr. Balkissoon is prepared to do so and we intend to introduce the entire bankruptcy court file which will substantiate the legitimacy of the mining operation.

We further have obtained accounting information from Amper, Politziner & Mattia, CPA's, Parkway Towers, 485 U.S. Highway I, Iselin, New Jersey, relative to the activities of Southern Eagle Mining Company for the period July, 1981 through June 30, 1982. This information was not available at the time of the Zimmerman trial because Mr. Zimmerman did not make available the funds to in fact locate this information.

The remaining proof we would introduce would be identical to the Zimmerman case, the difference being that we now have engineering material and accounting material and legal material referencing title which will substantiate Petitioners' position—material which was not available in the Zimmerman case.

Mr. Balkissoon was an investor in Satin Sewell 1 and 2; Mr. Zimmerman did not invest in both of these but he did promote them both. Mr. Balkissoon believed that in his trial Mr. Zimmerman would in fact expend adequate funds to properly defend his position; Mr. Zimmerman opted not to do so. Mr. Balkissoon was not permitted to participate in the Zimmerman case and cannot be held accountable for same.

Counsel for Mr. Balkissoon was also counsel for Mr. Zimmerman and counsel is embroiled in litigation with Mr. Zimmerman because Zimmerman would not pay his legal fees. Again, this substantiates that Mr. Zimmerman made a decision not to properly pursue his tax situation and compelled Judge Simpson to issue special orders in this regard.

It would be unfair and unjust if Mr. Balkissoon or any other investor in these programs who chooses to contest them should pay the price and be subject to the Zimmerman decision when, in fact, they were not parties to the Zimmerman litigation and Mr. Zimmerman decided not to spend the appropriate funds necessary to defend the case. Most importantly, the new engineering information completely refutes the Bondurant report upon which the government relied. Equally important, Attorney Mullens will testify as to the validity of all the title requirements necessary to connect the mining and the sale of coal with the individual investors.

It should be noted that the evidence in the Zimmerman Case did substantiate the mining of approximately $7,000,000.00 of coal. Mr. Arabinda N. Phukan, 8300 Merrifield Avenue, Fairfax, Virginia, will testify regarding Mr. Balkissoon's income tax. In addition, Mr. Balkissoon invested in another Zimmerman project in 1980 known as Upper Cumberland. This project has not yet been litigated. Mr. Balkissoon has paid for and obtained engineering data for Upper Cumberland and based on the information he has he can establish that Upper Cumberland was a viable mining venture, that it had commercial quantities of marketable coal and that it sold substantial amounts of coal but that the problem was that somehow the money never found its way back to the investors.

The 1980 Zimmerman cases have not yet been litigated.

Respondent has taken the position that Upper Cumberland is a sham and a fraud. Petitioners are thus faced with the problem that if the Court litigates the 1981 case first or if the Court holds that the Zimmerman case is controlling, then Petitioner has a problem in that he does not know how the Court will rule regarding the 1980 Upper Cumberland investment which is the subject of litigation in a tax court case.

If in fact the Court determines that Upper Cumberland is a sham and a fraud, then, of course, based on the documents in Balkissoon vs Commissioner, Petitioners would be entitled to a

deduction in 1981 as to the 1980 investment. It is impossible for Petitioners to know how to treat this matter until the 1980 matter is resolved. It would be unfair and unjust to try to resolve the 1981 matter before the 1988 matter because, in fact, the taxable result of the 1981 matter depends to a large extent on what happens in the 1980 matter.

In addition, Petitioners wish to contest the IRC 6653 and 6651 penalties imposed on Petitioners because it is Petitioners' position that they acted in good faith and relied upon professional and competent people in the preparation of their income tax reports. Mr. Phukan and Mr. Cupolo will testify as to this matter.

The Court requested that the parties submit their separate documented computations to the Court. It is impossible to do so pending resolution of the 1980 matter. If that matter is resolved in Mr. Balkissoon's favor then Mr. Balkissoon will only have the additional issue of the interest penalties to contest; however, if he loses the 1980 issue, then in fact there will be a substantial amount of money, to wit his cash invested, which if the court determines the investment to be a sham and fraud Mr Balkissoon would want to deduct from his 1981 return—but he cannot do so until there is a resolution of the 1980 return.

If the Court renders a decision in the 1981 return and 1981 case prior to any determination of the 1980 matter then, in fact, 1981

would be closed and Petitioners would be treated unfairly and unjustly and it is submitted that this certainly is not the intent of the Court.

In addition, Mr. Balkissoon wishes to utilize income averaging but how can he utilize income averaging until there is a resolution of the 1980 matter.

WHEREFORE, it is respectfully submitted that Zimmerman should not be controlling as to the tax payment.

_____/s/_____
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UNITED STATES TAX COURT

BASDEO BALKISSOON and GLORIA BALKISSOON,	)	
Petitioners,	)	
v.	)	Docket No. 32121-86 DT-ZIMMERMAN COAL
COMMISSIONER OF INTERNAL REVENUE,	)	Special Trial Judge Pajak
Respondent.	)	

RESPONDENT'S RESPONSE TO
PETITIONERS' RESPONSE TO ORDER TO SHOW CAUSE

RESPONDENT respectfully files this response in order to clarify the present records in this case.

Satin Sewell No. 2 Mining Associates
Satin Sewell Mining Program

1a. On May 5, 1986, respondent mailed a statutory notice of deficiency to petitioners disallowing petitioners' claimed deductions from Satin Sewell Mining Program and Satin Sewell #2 Mining Association.

Respondent also asserted the addition to tax pursuant to I.R.C. §§ 6653(a)(1), 6653(a)(2) and 6651(a)(1).

b. On July 21, 1986, petitioners filed a petition with this Court.

c. Respondent filed his answer in this case on or about October 7, 1986.

d. On August 2, 1989, the Court granted petitioners leave to File Amendment to Petition.

e. The Amendment to Petition raised seven issues not addressed in the notice of deficiency.

f. On or about August 16, 1989, respondent filed his Answer to Amendment to Petition.

g. In respondent's Answer to Amendment to Petition respondent alleged facts with respect to the addition to tax pursuant to I.R.C. 6651(a)(1) which facts remain unaddressed by petitioners.

h. Respondent contacted petitioners to advise petitioners of the need for a reply under Rule 37(c) to respondent's affirmative allegations in the Answer to Amendment to Petition.

Respondent received Petitioners' Response to Answer to Amendment to Petition on October 16, 1989, presumably meant as a reply. Said document does not comport with this Court's rules as petitioners fail to address the affirmative allegations raised by respondent.

i. Respondent filed a Motion for Entry of Order that Undenied Allegations in Answer be Deemed Admitted. This motion is still pending.

2a. On November 21, 1986, petitioners executed a Stipulation of Settlement (Exhibit A) whereby petitioners agreed to be bound with respect to Satin Sewell and Satin Sewell #2 under the same

formula that Satin Sewell #2 was resolved in Zimmerman, Docket No. 4661 85.

Petitioners also agreed to be bound by the I.R.C. § 6621(c) determination of the Court in Zimmerman. (Exhibit A)

b. In essence the parties agreed to treat Satin Sewell and Satin Sewell #2 as if they were in fact the same.

3a. On October 20, 1987, the Court filed an opinion in Zimmerman v Commissioner, T.C. Memo. 1987-534. In its opinion, the Court found that the parties in the test case had agreed that "the evidence presented with respect to Satin Sewell No. 2 Mining Associates and West Virginia Peerless Mining Associates will be controlling for participants in Satin Sewell Mining Program" (at page 933)

b. The Court in Zimmerman found that the taxpayer who participated in Satin Sewell No. 2 Mining Associates and West Virginia Peerless Mining Associates Coal Programs was not entitled to his claimed Schedule E deductions based on the following: (1) the programs were not "organized and operated with the primary objective of realizing an economic profit", but rather were designed primarily to "secure attractive tax write-offs for the participants"; (2) the net effect of the various agreements entered into between the participants and the programs was to ensure that participants would not be required to make additional out-of-pocket cash payments" [sic] on their notes, and

that "the notes had absolutely no apparent business purpose except to provide the participants with inflated tax deductions"; and (3) the programs failed to perform the requisite economic feasibility, marketability and other tests normally accomplished by profit-motivated coal mining operation prior to commencement of operations. The Court also found that I.R.C. § 6621(c) interest, as well as I.R.C. § 6673 damages were appropriate. I.R.C. §§ 6651(a)(1), 6653(a)(1) and (a)(2) were not at issue in the Zimmerman test case.

c. As noted by respondent in Respondent's Motion for an Order to Show Cause.[sic] Solely for purposes of the pending Order to Show Cause, respondent conceded the additions to tax pursuant to I.R.C. §§ 6653(a)(1) and 6653(a)(2).

d. As set forth in the Affidavit attached to Respondent's Motion for an Order to Show Cause, petitioners in this case are involved in the same Satin Sewell No. 2 Mining Associates that was litigated in Zimmerman and Satin Sewell Mining Program covered by the Opinion in Zimmerman.

e. Petitioners further agreed to be bound by the results in Zimmerman. (See paragraph 2a. above)

4a. Petitioners in their Response to Order to Show Cause admit the case "is no different factually from Zimmerman" but attempt to escape the natural consequences of the opinion in Zimmerman and

their Stipulation of Settlement through what, at best, can be described as frivolous allegations.

b. Petitioners both misstate the record in Zimmerman and attempt to rely on new "expert" reports that are irrelevant to the issue at hand.

c. Petitioners allege they have retained an "expert" to "substantiate the existence of commercial quantities of marketable coal.["] Pursuant to I.R.C. § 616 such new expert report would be irrelevant.

I.R.C. § 616(a) provides that there shall be allowed as a deduction in computing taxable income all expenditures paid or incurred during the taxable year for the development of a mine or other natural deposit; if paid or incurred after the existence of ores or minerals in commercially marketable quantities has been disclosed.

The deduction is clearly predicated on disclosure of commercially marketable quantities being disclosed prior to incurring cost. Such a determination, while clearly factual, must be made on the facts then existing not on a report just now being prepared.

Although such a new report may form the basis for the deductibility of development costs incurred in the future, it is not relevant to the facts as then existing.

d. Although not wanting to enter into a thorough analysis of the new expert reports at this time, respondent notes even a cursory

review indicates it is no more probative than these reports already provided to this Court and found lacking in credibility in Zimmerman.

In fact, the new report states "we do not have all the information to conduct a feasibility study at this time."

e. Respondent also does not wish to enter into a long dissertation of the reasons why the petitioners' new expert report does not in fact refute respondent's expert. However, respondent will admit the statements contained in the new expert report do not comport with the record in Zimmerman.

5. None of the assertions made by petitioners in their Response to Order to Show Cause, even if substantiated, would support a different opinion than in Zimmerman.

6. Petitioners agreed to be bound and should be held to that agreement. The success of the system in resolving the myriad of shelter cases over the years has been in part attributable to such Stipulation of Settlement or "piggyback" agreements.

In each case a petitioner can always assert they would have done it better or would have done it differently. That option, of course, was always available to petitioners. Petitioners simply could have refrained from executing the Stipulation of Settlement.

Having agreed to be bound they should be bound. Additionally, the facts asserted by petitioners in their response are simply not relevant to the issues as decided by the Court.

ABRAHAM N.M. SHASHY, JR.
Chief Counsel
Internal Revenue Service

July 17, 1990

By:_____/s/_____
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